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EX PARTE OR LATE FILED

December 19, 1994

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FEDERAL COMMUNICATIONS COMMISSION

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

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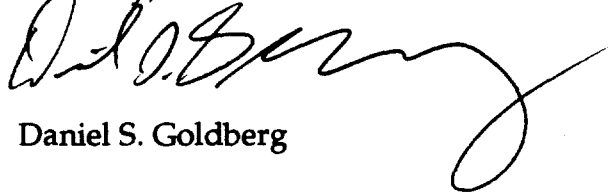
Re: PR Docket No. 89-553, 93-144 and 93-253
Ex Parte Presentation

Dear Mr. Caton:

Please be advised that RAM Mobile Data USA Limited Partnership sent the attached memorandum and cover letter today to Ms. Rosalind Allen, with copies to Regina Keeney, Gerald Vaughn, Ralph A. Haller, David Furth, Gregory Rosston, Amy Zoslov and Thomas Dombrowsky. Two copies of this memorandum and cover letter are hereby submitted for the public record in this proceeding pursuant to 47 C.F.R. § 1.1206(a)(1).

If there are any questions in this regard, please contact the undersigned.

Sincerely,



Daniel S. Goldberg

Attachments

No. of Copies rec'd 0+3
List ABCDE

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December 19, 1994

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DEC 19 1994
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

BY HAND

Ms. Rosalind K. Allen
Chief, Land Mobile and Microwave Division
Private Radio Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5202
Washington, D.C. 20554

Re: PR Docket No. 89-553, 93-144 and 93-253
Ex Parte Presentation

Dear Ms. Allen:

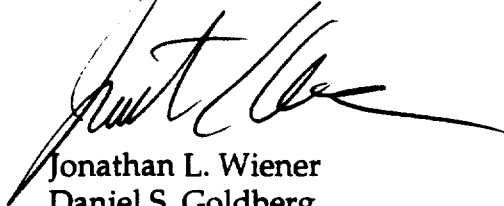
RAM Mobile Data USA Limited Partnership ("RMD") has a vital interest in the technical and auction rules ultimately adopted for 900 MHz specialized mobile radio ("SMR"). In this regard, we are submitting with this letter a memorandum discussing the technical and auction rules and a draft of proposed technical rules that are appropriate for 900 MHz SMRs in light of the regulatory framework the Commission created in its Third Report and Order, PR Docket Nos. 93-144 and 93-253.

While the 800 MHz SMR docket is referenced above, and the attached memorandum refers to the Commission's Further Notice of Proposed Rule Making, PR Docket Nos. 93-144 and 93-253 (November 4, 1994) for comparative purposes, RMD takes no position on the outcome of that proceeding as specifically related to 800 MHz rules.

Ms. Rosalind K. Allen
December 19, 1994
Page 2

We hope to be able again to meet with you and your staff in the near future to discuss and answer any questions about RMD's proposal.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jonathan L. Wiener", written over the typed name.

Jonathan L. Wiener
Daniel S. Goldberg
Attorneys for RAM Mobile Data
USA Limited Partnership

cc (by hand):

Regina Keeney
Gerald Vaughn
Ralph A. Haller
David Furth
Gregory Rosston
Amy Zoslov
Thomas Dombrowsky

MEMORANDUM

Re. Proposed Technical and Auction Rules for 900 MHz SMR Service

This memorandum sets forth a description of, and basis for, technical and auction rules¹ proposed by RAM Mobile Data USA Limited Partnership ("RMD") for the 900 MHz specialized mobile radio ("SMR") service. RMD's proposed technical rules are attached as Appendix A, hereto. Two copies of this memorandum have been submitted to the Secretary's office pursuant to 47 C.F.R. § 1.1206(a)(1).

While the focus of this memorandum is the 900 MHz SMR service, references are made to the Commission's pending 800 MHz SMR proceeding.² These references are made only by way of comparison, as a number of important parallels and distinctions can be drawn between the 800 and 900 MHz SMR services. RMD takes no position on the proposals made and tentative conclusions reached in the 800 MHz SMR Notice as applied to that band.

I. PREMISES UNDERLYING PROPOSED TECHNICAL AND AUCTION RULES

RMD's proposed technical rules have three underlying premises, two of which also underlie the proposed auction rules. First, wide-area 900 MHz SMR licensees must be accorded a high degree of operational flexibility with respect to the location, design, construction, and modification of their facilities throughout their service areas, similar to that enjoyed by cellular and future personal communications services ("PCS") licensees and proposed for 800 MHz SMR licensees in the 800 MHz SMR Notice. Thus, the technical rules proposed by RMD would permit 900 MHz SMR licensees to construct stations at any available site and on any available channel that they are licensed to use within their service areas, and to "self-coordinate" system modifications (*i.e.*, add, subtract, move and otherwise

¹ These proposals are based on the auction and rule decisions announced by the Commission in its Third Report and Order, GN Docket No. 93-252, PR Docket Nos. 93-144 and 89-553 (September 23, 1994). RMD intends to file a petition for reconsideration of that decision and anticipates that others will do the same. Nevertheless, taking the construct that the Third Report and Order set forth as a given, RMD believes that it is important to move forward with technical and auction rules so that "Phase II" SMR licensing, in some form, can finally proceed.

² Further Notice of Proposed Rulemaking, PR Docket Nos. 93-144 and 93-253 (November 4, 1994) ("800 MHz SMR Notice").

modify base station facilities) within their service areas without prior Commission consent.

Second, while 900 MHz SMR is classified as a commercial mobile radio service ("CMRS"), the limited number of narrow 12.5 kHz channels allocated to 900 MHz SMRs have not been shown to date, and may not ever practically, support the cellular type, consumer-oriented voice services that are, or will soon be, offered by other CMRS providers, including 30 MHz broadband PCS, cellular and 800 MHz ESMR licensees. As a result, unlike those CMRS providers who offer principally interactive, real-time mobile voice services to the general public, 900 MHz SMR operators must provide more limited, specialized services to non-consumer entities.

This fundamental distinction between 900 MHz SMR providers and cellular-type CMRS providers should be reflected in the rules for 900 MHz SMRs.³ Thus, in reference to the technical rules, the fact that 900 MHz SMR operators provide primarily specialized business services to non-consumer entities justifies a reduced coverage requirement for 900 MHz SMRs relative to CMRS licensees providing cellular-like services, particularly in light of the fact that there is no BTA alternative for 900 MHz. Moreover, in reference to the auction rules, the more limited spectrum available and, consequently, range of services that can be supported at 900 MHz invariably will result in 900 MHz MTA licenses being less valuable than 30 MHz PCS and 800 MHz ESMR licenses, a fact that warrants a more tailored definition of what constitutes a small business and more modest bidding credits relative to the auction rules adopted for PCS and proposed for 800 MHz SMRs.

Third, the technical and auction rules ultimately adopted for 900 MHz SMRs must take into account the existence of the wide-area SMR systems currently operating in this service. While the Commission has indicated that it will license

³ The intent of the regulatory parity legislation was to eliminate the disparate regulatory treatment between cellular licensees and ESMR licensees (e.g., Nextel), both of which provide mobile voice services that are virtually indistinguishable from the consumer's perspective. Regulatory parity does not, however, require that all commercial mobile radio services be subject to identical regulatory requirements, particularly services that are not full functional equivalents. In this regard, the fact that the Nextel/Motorola ESMR system cannot function in the 900 MHz environment (a fact reflected in the proposed consent decree between the Department of Justice and Nextel concerning Nextel's contemplated acquisition of Motorola's SMR operations) supports the conclusion that the regulatory requirements applicable to 900 MHz SMRs need not be identical to those applicable to 800 MHz SMR service providers capable of offering a full array of cellular-type services. For similar reasons, the Commission has adopted different rules for 30 MHz PCS than 10 MHz PCS or narrowband PCS, both with respect to auction processes and operational/technical requirements.

900 MHz SMRs on an MTA basis,⁴ the wide-area operations of incumbent licensees must be protected from interference *vis-a-vis* the licensees of the MTAs in which incumbent operations are located. Additionally, incumbent licensees should be accorded the same high degree of flexibility to operate on a wide area basis within their protected areas of operation as MTA licensees will have to operate within their MTA service areas, so as to afford each the best ability to serve and quickly and flexibly respond to their respective customers' requirements with the least degree of government regulation required.⁵

Accordingly, the technical rules proposed by RMD: (i) provide for the wide-area licensing within areas defined by the overlapping contours of an incumbent's licensed facilities in the same ten-channel frequency block, (ii) require MTA licensees to afford protection to such incumbent operations, (iii) allow incumbents to modify and relocate sites within their protected wide-areas of operation, so long as the incumbent's initially authorized interference contours are not expanded, and (iv) provide for simplified calculations of service and interference contours, as well as the virtual elimination of "short-spacing," thereby resulting in a more stable operating co-channel environment and reducing instances in which Commission administrative intervention would be required to resolve disputes among co-channel licensees.

The presence of incumbent operations also precludes the establishment of an entrepreneurs' block in the 900 MHz SMR spectrum and, to avoid jeopardizing the ability of incumbents to build-out their existing systems, requires the Commission to ensure that designated entity bidding credits apply only to unencumbered ten-channel blocks, or at least to the least encumbered channel block(s) within an MTA. Moreover, channel blocks having existing incumbent operations, which would prevent a new entrant from satisfying whatever coverage requirements the

⁴ The rules proposed herein are based on the assumption that 900 MHz SMRs will be licensed on an MTA basis. RMD understands that Rand-McNally claims certain rights in the MTA geographic construct and is attempting with other industry representatives to establish a suitable licensing arrangement with Rand-McNally. If no such arrangement can be fashioned, however, it is likely that alternative service areas will have to be selected.

⁵ Consistent with the Commission's decision to exempt licensees that operate on an exclusive basis in Commission-defined service areas (as opposed to station-by-station) from station identification rules (Third Report and Order at ¶ 216), wide area incumbent SMR licensees that convert their site specific licenses to Incumbent Wide Area Licenses (as defined in Appendix A, hereto) should also be exempt from such rules. A proposed modification to § 90.425(e)(1) of the Commission's Rules is set forth in Appendix A, hereto. Should the Commission adopt additional rules granting technical operational flexibility to MTA-based 900 MHz SMR licensees, such rules should also apply to Incumbent Wide Area License grantees.

Commission ultimately adopts, should be excluded from the auction. In this regard, the relatively low coverage requirement RMD proposes would expand the number of encumbered channel blocks for which a new entrant would be eligible. Finally, because some ten-channel blocks are more heavily encumbered than others, licenses within MTAs will have different values, making it impossible to extrapolate the value of any given license from the auction values of others.

II. DESCRIPTION OF PROPOSED TECHNICAL RULES

A. Construction/Coverage Requirements. RMD proposes that 900 MHz MTA licensees be required to provide coverage to one-fourth of the population of their service area within three years of the date of license grant, and to one-third within five years. Coverage would be based on ten-channel blocks, with coverage being calculated as the aggregate coverage of any one or more of the licensed ten channels. A licensee would be required separately to meet the coverage requirement for each ten-channel block in which it was licensed in a given MTA.

While this proposed coverage requirement is less than that for certain CMRS services (*e.g.*, 30 MHz PCS), a reduced coverage requirement is warranted for 900 MHz SMR in light of the fact that, as discussed above, 900 MHz SMR licensees offer principally specialized business services to non-consumer entities. Moreover, while the Commission justified a higher proposed coverage requirement for 800 MHz SMR licensees, in part, by noting that 800 MHz facilities already have been substantially built-out,⁶ that is not the case with 900 MHz SMR systems. Unlike 800 MHz SMR licensees, who generally constructed the sites for which they were licensed to operate, the Commission canceled nearly one-half of the initial DFA licenses for 900 MHz SMR licensees for failure to satisfy construction requirements. Even if that were not the case, 800 MHz SMRs had a ten-year head start on 900 MHz SMRs and were not limited to constructing facilities outside of the top-50 markets.

Because the types of services offered at 900 MHz are more analogous to the types of "niche" services expected to be offered by 10 MHz PCS licensees than they are to the cellular type, consumer oriented voice services offered by 800 MHz ESMR and 30 MHz PCS, the coverage requirement adopted for 10 MHz PCS (*i.e.*, coverage of one-fourth of the service area within five years or, alternatively, a showing that they are providing substantial service) may be a relevant starting point when

⁶ 800 MHz SMR Notice at 27.

fashioning a coverage requirement for 900 MHz SMR. Still, because incumbent 900 MHz SMR licensees have constructed facilities, albeit not on the scale of 800 MHz licensees, the 10 MHz PCS standard is not entirely apt: the "substantial service showing" component is overly subjective and does not adequately ensure that prospective licensees will construct facilities sufficient to serve a substantial portion of the population in their service area, while the one-fourth component does not adequately take into account existing facilities in this band. While neither the 10 MHz PCS nor the 800 MHz coverage requirements offer ideal models for 900 MHz SMRs, RMD believes that its proposed coverage requirement offers a fair compromise by taking into account both the prior licensing history and non-consumer nature of the 900 MHz SMR service.

It may be, of course, that over time 900 MHz service will become as ubiquitous as 800 MHz service and cellular. However, at present, there is no strong indication that this is the manner in which the service will develop and, in light of this fact, the Commission must not impose an overly ambitious and unrealistic coverage requirement on 900 MHz licensees. Such a requirement would set prospective MTA licensees up for failure, a result that plainly would not further competition or otherwise advance the public interest. Existing market realities and the sound business judgment of current 900 MHz SMR licensees indicate that the coverage requirement proposed herein is an appropriate one.

B. Treatment of Incumbent Systems.

1. Protected Sites. Under the rules proposed by RMD, existing SMR systems would be safeguarded from interference from future MTA licensees. Thus, future MTA licensees would be required to afford interference protection to 900 MHz sites licensed and subject to pending license application prior to August 10, 1994, ("Protected Sites").⁷

In reference to the pending applications, just as in the 800 MHz SMR service, there are a great many 900 MHz applications which have been subject to pending application prior to August 10, 1994. In recognition of the fact that SMR applicants are not to blame for the licensing delays, the Commission has decided to process the pending 800 MHz applications.⁸ Because 900 MHz licensees are likewise blameless for processing delays, 900 MHz applications pending since August 10, 1994, also

⁷ The Commission envisioned a similar approach for 800 MHz SMRs. *Id.* at 11 and 20.

⁸ FCC News Release, November 22, 1994.

should be processed and the sites ultimately authorized should be accorded co-channel protection.

The Commission's decision to decide by lottery, rather than auction, pending cellular applications also supports granting protected status to 900 MHz SMR sites subject to pending license application prior to August 10, 1994.⁹ Like the pending cellular applications, the pending 900 MHz applications represent a substantial investment by applicants. These 900 MHz applications are not mere "paper" filings; they reflect, rather, the efforts of incumbent 900 MHz SMR licensees to move forward with their network roll-out in the absence of the long-awaited "Phase II" licensing process. Moreover, unlike cellular, many 900 MHz SMR applicants, consistent with Commission practice, already have constructed the facilities now subject to pending application (or granted since August 9, 1994), facilities that are part of licensed SMR systems and which, therefore, would have been authorized in the ordinary course. The fact that 900 MHz applicants, consistent with Commission practice, invested in sites still subject to application makes extending protected status to these sites all the more compelling.

2. Incumbent Protected Area.

(a) Incumbent Protected Area Calculation. Under RMD's proposed rules, a 900 MHz system with multiple contiguous Protected Sites in the same ten-channel block would be permitted to operate, and could be licensed on,¹⁰ a wide-area basis, such area demarcated by the aggregate of the 40 dBu service contours around each of the incumbent's contiguous Protected Sites.¹¹ MTA licensees would be required to afford interference protection to the Protected Areas in accordance with the minimum distance separation criteria set forth in 47 C.F.R. 90.621(b). An example of how such an Incumbent Protected Area would be drawn is shown in Appendix B to this submission.

⁹ Memorandum, Opinion and Order, PP Docket No. 93-253 (July 14, 1994).

¹⁰ Wide area incumbent licensees could exchange current multiple site specific licenses in an MTA for one "Incumbent Wide Area License."

¹¹ Because it may be less complex from an administrative standpoint to define Incumbent Protected Areas in terms of mileage rather than signal contours, the rules proposed herein set forth both approaches in bracketed alternatives. Thus, because the 40 dBu service contour is roughly equivalent to 25 miles (or 40 miles in those areas identified in § 90.621(b) where the minimum mileage separation distance is 105 miles), the boundaries of the Incumbent Protected Areas would correspond to the aggregate of the 25 mile radii (or 40 mile radii, as applicable) around each contiguous Protected Site operating in the same ten-channel block. The use of such fixed mileages and the elimination of short spacing would lead to a much more predictable and stable co-channel environment than has been the case in 800 MHz SMR.

(b) Applicable to All Ten Channels. In order to avoid intrasystem interference, wide-area SMRs just like other mobile service licensees (e.g., cellular) do not operate all licensed channels at all sites. However, to provide an incumbent licensee with the level of operational flexibility it needs to manage a wide-area SMR system, MTA licensees should be required to afford such incumbent interference protection on all ten-channels throughout the Incumbent Protected Area, notwithstanding the fact that, at any given time, a particular site within the Incumbent Protected Area does not make use of all ten-channels. In this regard, it is not practical for systems to operate with interweaving channels within particular ten-channel blocks over the same extended area. Thus, this rule would apply the same principles that are applied for determining coverage by MTA licenses; *i.e.*, looking at the aggregate contours of all channels within a ten-channel block.

(c) Multiple Incumbent Protected Areas. Just as with MTA coverage calculations, if an incumbent has contiguous Protected Sites on more than one ten-channel block, Incumbent Protected Area calculations would be made separately for each block. Additionally, if a licensee has non-contiguous Protected Sites within an MTA (*i.e.*, those where the 40 dBu contours do not overlap), Incumbent Protected Area(s) calculations should be determined separately such that, with the exception of *de minimis* changes, no area that is not protected on the particular ten-channel block should become protected, unless the incumbent secures the particular MTA license.

3. Operational Flexibility.

(a) Incumbent Operating Area. A wide-area incumbent licensee should be given the same degree of operational flexibility as an MTA licensee, so long as the incumbent's wide-area system does not pose a greater degree of interference potential to the adjacent MTA licensee as did the incumbent's originally-authorized Protected Sites. Such an approach provides wide-area incumbents with needed operational flexibility to serve the public efficiently, while at the same time preserving the legitimate rights to interference protection of both the incumbent and adjacent MTA licensee. Accordingly, under RMD's proposed rules, an incumbent licensee would be free to construct, modify or relocate sites within its Incumbent Operating Area (as defined below), provided that its 22 dBu contour (the interference contour) remains within the Incumbent Operating Area,

defined by aggregating the 22 dBu interference contours around each of the incumbent's contiguous Protected Sites.¹²

The Commission made a similar proposal in the 800 MHz SMR Notice, but stated that, to protect the adjacent MTA licensee, incumbent licensees would be permitted to make system changes only to the extent that their initially authorized 40 dBu contour was not expanded.¹³ While RMD agrees with the Commission's objective of providing incumbents with some degree of operational flexibility, RMD submits that the outer contour which should generally remain fixed in order to protect the adjacent MTA licensee is the incumbent's 22 dBu interference contour, not the 40 dBu service contour. Thus, as provided in RMD's proposed rules, where an incumbent can expand its 40 dBu contour without increasing its 22 dBu contour it should be permitted to do so: such an approach enhances the incumbent's operational flexibility and ability to serve more intensively customers within its service area without impinging upon the permissible operations of the adjacent MTA licensee.¹⁴ An example of how an Incumbent Operating Area would be drawn is shown in Appendix B to this submission.

(b) Consolidating Frequency Blocks. Anytime prior to the point that the Commission releases the Public Notice(s) announcing the 900 MHz auction, RMD's proposed rules would permit an incumbent licensee to exchange its presently authorized ten-channel block for another ten-channel block within the same MTA, provided that the boundaries of the Incumbent Protected Area do not change. The ability to exchange frequency blocks will allow incumbents to consolidate ten-channel blocks within and across MTAs, thereby making more efficient their wide-area systems. Moreover, consolidating incumbent operations in

¹² As in the case of Incumbent Protected Areas, because it may be less complex from an administrative standpoint to define Incumbent Operating Areas in terms of mileage rather than signal contours, the rules proposed herein set forth both approaches in bracketed alternatives. Thus, because the 22 dBu service contour is roughly equivalent to 45 miles (or 60 miles in those areas identified in § 90.621(b) where the minimum mileage separation distance is 105 miles), the boundaries of the Incumbent Operating Areas would correspond to the aggregate of the 45 mile radii (or 60 mile radii, as applicable) around each contiguous Protected Site operating in the same ten-channel block.

¹³ 800 MHz SMR Notice at 25.

¹⁴ Other interested parties have suggested that incumbents be permitted to construct new sites with contours that are within the DFA areas to which they have been previously licensed. RMD understands that these proposals are made to allow added flexibility and would be in addition to the kind of system modification within licensed contours proposed by RMD, which in many cases extend beyond DFA boundaries. As long as understood as an add on to the basic ability of incumbent licensees to modify their facilities within currently licensed contours, RMD does not oppose such DFA expansion rights.

common ten-channel blocks within and throughout all MTAs will clear common frequency blocks for new entrants, facilitating their ability to consolidate frequency blocks for their planned wide-area operations. Once the MTA licensing process is complete, exchanges of frequency blocks could continue provided that all affected licensees consent to the exchange.¹⁵

4. De Minimis Expansions. Notwithstanding the foregoing, RMD's proposed rules would allow incumbents to make minor alterations to their existing service areas to preserve the viability of their systems.¹⁶ Thus, borrowing from the Commission's cellular experience,¹⁷ RMD's proposed technical rules allow for modifications that result in *de minimis* expansions of an Incumbent Operating Area if such expansions are demonstrably unavoidable for sound technical reasons and the incumbent coordinates in advance with the adjacent MTA licensee.

5. Secondary Sites. Consistent with current practice, the Commission should continue to accept and process applications for secondary sites located outside of an Incumbent Operating Area. While such sites would not be permitted to interfere with the facilities of the adjacent MTA licensee and, moreover, would have to accept interference from such licensee's operations, the ability to construct these sites is essential to ensure that incumbents can meet their customers' needs. Incumbents' ability to construct and operate secondary sites is particularly important before and in the early stages of MTA licensing, when new licensees are just getting underway and it is unclear whether incumbents will be able to secure the corresponding MTA license or, if not, whether the MTA licensee will be committed to build-out systems in all areas.

¹⁵ With respect to the transfer and/or assignment of incumbents' authorizations, unlike the Commission's proposal at 800 MHz (*Id.* at 20), the rules proposed by RMD do not give rise to a presumption that any request for transfer or assignment of an incumbent authorization to the licensee of the MTA in which the incumbent operations are located is in the public interest. The creation of such a presumption could be misconstrued as giving rise to a negative pregnant (*i.e.*, that the transfer or assignment of an incumbent authorization to anyone but the MTA licensee is not in the public interest) that would be violative of the Communications Act of 1934, as amended. In order to avoid the potential for the creation of litigation over preferred assignees, RMD's proposed rules contain no special preferences for transfers or assignments of incumbent authorizations. Moreover, given the generally routine nature of most license assignments, RMD does not believe that the lack of any specified preference will be of any hindrance to any proposed assignment of an MTA license to a legally qualified assignee.

¹⁶ The Commission made a similar proposal in the 800 MHz SMR proceeding. *Id.* at 23.

¹⁷ 47 C.F.R. 22.903(d)(1).

C. Wide Area Rules. RMD's proposed rules would permit MTA licensees to construct and operate base stations anywhere within their licensed service areas, subject to protection for incumbents (in the manner described above), and compliance with international agreements that restrict the use of certain frequencies. Providers of other CMRS services have been granted the same level of operational flexibility, and regulatory parity objectives require that the Commission extend similar flexibility to 900 MHz SMR licensees.

The Commission proposed wide-area rules in the 800 MHz SMR Notice under which an MTA licensee could construct and operate base stations anywhere within its licensed service areas provided that it did not exceed a signal level of 22 dBu (a licensee's interference contour) at its service area boundaries, unless it negotiates a different signal strength limit with all potentially affected adjacent MTA licensees.¹⁸ RMD believes that the Commission's proposed approach, however, is unnecessarily restrictive: It precludes coverage of those areas within an MTA located between a licensee's 22 dBu contour and 40 dBu contour (the service contour), a swath of geography approximately 20 miles wide running along the inside of the MTA's licensed boundaries.

To ensure that individuals located within this area can receive coverage, RMD's proposed rules allow a licensee to take its 40 dBu contour to the boundary of its licensed service area.¹⁹ In order to avoid interference at or near the service area boundaries, RMD proposes that adjacent licensees be required to coordinate in good faith their respective operations along MTA borders. In the unlikely event that adjacent licensees could not coordinate on a voluntary, multilateral basis, the Commission would reserve the authority to mediate, and ultimately impose, a frequency coordination scheme.

III. DESCRIPTION OF PROPOSED AUCTION RULES

Assuming that all frequencies will be auctioned as proposed, RMD generally supports the Commission's "generic" auction rules for the prospective 900 MHz license auction(s), as these rules have been shown to be effective at licensing frequencies quickly and to the applicant that most values the license. RMD suggests some variation, however, to allow the auction procedures better to take into

¹⁸ 800 MHz SMR Notice at 19-20.

¹⁹ Adjacent licensees could negotiate among themselves for even higher signal strength limits at their borders.

account the existence of incumbent operations that cannot be relocated to another portion of the spectrum, as well as the relatively low expected 900 MHz license values and the fact that licenses are not fungible.

A. Initial Eligibility. In the 800 MHz SMR Notice, the Commission seeks comment on whether there is any need to restrict initial eligibility for wide-area licenses to incumbent licensees within the relevant MTA or BTA.²⁰ RMD has long maintained that, because 900 MHz SMR incumbents took the risks associated with constructing initial facilities and then were subsequently precluded from building-out their systems owing to licensing delays and the failure to commence with Phase II of the SMR licensing process, incumbents alone should be given the first opportunity to obtain rights in the spectrum necessary to complete the build-out of their partially constructed wide-area systems. If the Commission concludes it will restrict initial eligibility in the 800 MHz auction(s) to incumbent licensees, the same conclusion should apply to the 900 MHz auction(s).

If, however, the Commission declines to restrict initial eligibility to incumbent licensees, at a minimum, channel blocks where a new entrant cannot satisfy the coverage requirements because of incumbent operations should be excluded from auction. An applicant that bids on a channel block where it cannot as a matter of fact meet the minimum coverage requirement is likely to be an insincere bidder, seeking to block an incumbent's system and/or impose additional costs on an incumbent rather than attempting in good faith to obtain the rights to construct a system of its own. In order to avoid the potential for such manipulative bidding, these heavily encumbered channel blocks should be excluded from auction. Importantly, the relatively low coverage requirement RMD supports for 900 MHz SMRs would increase the number of encumbered channel blocks on which a new entrant could bid.

B. Auction Design. In order to ensure that the 900 MHz ten-channel blocks are licensed quickly and to the applicant that most highly values the license, RMD urges the Commission to use a simultaneous multiple round auction design. To further expedite the licensing process, all the licenses should be auctioned together, unless a simpler approach (e.g., by MTA or by all of the MTAs in a given region, such regions to be analogous to those used for regional narrowband PCS) is

²⁰ 800 MHz SMR Notice at 32.

required (e.g., if the Commission's auction software cannot accommodate auctioning all of the licenses together).

C. Procedural, Payment and Penalty Issues. RMD supports the use of the Commission's standard pre-auction procedures (including the filing of FCC Forms 175 and the accompanying certifications, and the manner in which the requisite upfront payment is calculated), as well as its generic stopping rules, activity rules, and bid withdrawal, default and disqualification procedures. Because the value of 900 MHz MTA licenses is unclear and, in any event, likely will be low in view of the presence of incumbent operations and the fact that the Commission canceled nearly one-half of the initial DFA licenses for failure to satisfy construction requirements, the Commission should not impose a minimum opening bid or reservation price for the licenses. A minimum bid could not accurately gauge the value prospective bidders will assign to a particular license, particularly in light of the fact that some licenses will be more encumbered than others. In reference to bid increments, RMD supports increments of 5% of the previous high bid, or as determined by the Commission on an ad hoc basis.

D. Designated Entities.

1. Provisions for Minority and Women-Owned Businesses and Small Businesses. Assuming the Commission adopts special bidding provisions for designated entities, RMD supports the use of tax certificates²¹ and bidding credits to assure that businesses owned by women and minorities can participate in the 900 MHz auction, as well as installment payments to facilitate the participation of small businesses.²² In light of the expected low license values of 900 MHz licenses relative to licenses for PCS and 800 MHz SMRs, as well as the comparatively modest capital requirements required to satisfy the relatively low coverage requirements proposed herein, the Commission should define a small business as an entity with net worth not in excess of \$6 million and with average net income

²¹ Tax certificates would be issued to: (i) non-controlling initial investors in minority and female-owned 900 MHz SMR applicants and licensees, upon the sale of their non-controlling interests; and (ii) 900 MHz licensees who assign or transfer control of their licenses to minority and female-owned entities.

²² Given the relatively modest build-out costs required to serve rural areas, as well as the fact that rural telephone companies can use their existing infrastructure to support integrated 900 MHz SMR service in their service areas, RMD opposes the creation of special bidding provisions for rural telephone companies.

after Federal income taxes for the two proceeding years not in excess of \$2 million (*i.e.*, the existing SBA definition of "small business").

The expected low 900 MHz MTA license values and reduced coverage requirements also justify bidding credits of 25% for women and minority-owned businesses. Bidding credits of 40%, while arguably appropriate in the PCS service in view of the high license values and coverage requirements, would be excessive in the 900 MHz SMR context and would unfairly disadvantage non-designated entity applicants. Thus, the definition of small business (and the small business installment payment program) proposed herein, as well as the tax certificate program and level of bidding credits RMD supports for minority and women-owned businesses, will allow the meaningful participation of such businesses in the 900 MHz auction, while at the same time preserving the benefits of competitive bidding.²³

2. Entrepreneurs' Block Is Not Feasible. As the Commission concluded in the 800 MHz proceeding, the presence of incumbent operations makes it impractical to identify a particular channel block throughout the MTAs that could be designated as an entrepreneurs' block.²⁴ This is also the case with 900 MHz: Even if incumbents exchanged frequencies in an effort to consolidate their operations on certain common channel blocks, there are too many incumbent systems spread over too broad a range of frequency blocks to make the creation of an entrepreneurs' block feasible.

3. Distribution of Bidding Credits. Even if the Commission declines to restrict initial eligibility on some frequencies to incumbent licensees, the presence of incumbent operations also should be considered when determining which licenses will be subject to bidding credits. Both existing service providers and new women and minority-owned businesses would be better served by having credits on unencumbered licenses instead of encumbered ones. Applying credits to encumbered licenses would place incumbents at a disadvantage when bidding on blocks needed to complete the build-out of their systems and would give rise to the

²³ When adopting designated entity provisions for the 900 MHz MTA auction, the Commission should use the same attribution and affiliation rules, as well as unjust enrichment provisions, that it used in previous auctions.

²⁴ 800 MHz SMR Notice at 50.

potential for insincere bidding.²⁵ Finally, by making it less likely that incumbents would obtain the frequency blocks used by their existing facilities, applying bidding credits to encumbered ten-channel blocks would create a patchwork of service areas, defeating the Commission's objective of creating wide-area SMR systems.

For the foregoing reasons, RMD suggests that bidding credits apply to up to 300 unencumbered ten-channel block licenses,²⁶ spread as evenly as possible throughout the MTAs where unencumbered ten-channel blocks are available. RMD recognizes that this approach would not result in bidding credits for licenses in some of the largest markets where no unencumbered blocks remain. However, because the extent of encumbered operations in these frequency blocks substantially reduces the value of these licenses, the extension of credits to these licenses would not necessarily be of much benefit to designated entities truly working to build their own independent operating systems.

If, notwithstanding the above, the Commission believes that it must give credits in all markets, the Commission could pursue one of the following approaches: The Commission could select two or three ten-channel blocks in each MTA that are either unencumbered or, where no unencumbered licenses exist, are the least encumbered. Alternatively, the Commission could select the two or three channel blocks that are the least licensed throughout all of the MTAs and provide bidding credits for licenses in those common blocks. Neither of these alternative approaches is without administrative difficulty or, in RMD's judgment, preferable to limiting bidding credits to unencumbered licenses. But each would be preferable to bidding credits that applied to all licenses, without consideration of the investment and construction already made in certain areas in some ten-channel blocks.

²⁵ Thus, a bidder with a bidding credit on an encumbered block could, using its credit, outbid the incumbent licensee and then seek to enter into an arrangement (perhaps styled as a management agreement) with the incumbent effectively selling the frequencies covered by the MTA license, with the threat of preventing completion of the existing system's network if an agreement is not reached. The arrangement would provide the designated entity with a profit, made possible only by virtue of the bidding credit. While the Commission's unjust enrichment provisions are designed to avoid such a result, these provisions have never been tested, much less successfully enforced, and experience suggests that licensees will always find ways around them.

²⁶ 300 licenses represents roughly one-third of the total licenses to be auctioned, a ratio consistent with the number of licenses the Commission has applied bidding credits to in the past (e.g., narrowband PCS).

E. Timing of Auction(s). The Commission should auction 900 MHz licenses as quickly as possible, particularly with respect to MTAs with substantial incumbent operations. The failure to proceed with Phase II of the 900 MHz SMR licensing process has left existing licensees in limbo for over five years, reluctant to build-out their current systems for fear of ultimately losing the substantial investment associated with such construction. The sooner the auctions take place, the sooner SMR licensees can implement their long-standing business plans and provide coverage to areas heretofore unserved.

In any event, the 900 MHz auction should precede the 800 MHz auction, a position well-supported in light of the fact that (i) there are more complex issues to resolve in the 800 MHz SMR proceeding (a fact the Commission acknowledged when it extended the comment and reply comment deadlines in response to numerous petitions from 800 MHz licensees seeking extensions of these deadlines as a result of the complexity of the issues implicated in the 800 MHz proceeding) and (ii) there is greater need to proceed with licensing at 900 MHz than at 800 MHz, as 900 MHz licensees have been in limbo for so long, while 800 MHz licensees have been able to construct and operate sites on a primary basis.

Attachment

APPENDIX A

1. Section 90.7 is amended by adding the definitions for "Incumbent Operating Area," "Incumbent Protected Area" and "Incumbent Wide Area License" following the definition for "Harmful interference," "Major Trading Area" following the definition for "Line C," and "MTA license" following the definition for "Mobile station" to read as follows:

§ 90.7 Definitions

* * * * *

[Incumbent Operating Area. An area coterminous with the aggregate of the 22 dBuV/m contours of an incumbent licensee's contiguous base stations that were licensed or subject to pending application prior to August 10, 1994, in the same ten-channel block in the 896-901/935-940 MHz band.]

[-or-]

[Incumbent Operating Area. An area coterminous with the aggregate of the 45 mile radii (or 60 mile radii for those base stations in areas identified in §90.621(b) where the minimum mileage separation distance is 105 miles) of an incumbent licensee's contiguous base stations that were licensed or subject to pending application prior to August 10, 1994, in the same ten-channel block in the 896-901/935-940 MHz band.]

* * * * *

[Incumbent Protected Area. An area coterminous with the aggregate of the 40 dBuV/m contours of an incumbent licensee's contiguous base stations that were licensed or subject to pending application prior to August 10, 1994, in the same ten-channel block in the 896-901/935-940 MHz band.]

[-or-]

[Incumbent Protected Area. An area coterminous with the aggregate of the 25 mile radii (or 40 mile radii for those base stations in areas identified in §90.621(b) where the minimum mileage separation distance is 105 miles) of an incumbent licensee's contiguous base stations that were licensed or subject to pending application prior to August 10, 1994, in the same ten-channel block in the 896-901/935-940 MHz band.]

* * * * *

Incumbent Wide Area License. A license issued under §90.781.

* * * * *

Major Trading Areas (MTAs). A total of 51 licensing regions based on the Rand McNally 1992 *Commercial Atlas & Marketing Guide*, 123rd Edition, at pages 38-39, with the following exceptions and additions:

- (1) Alaska is separate from the Seattle MTA and is licensed as a single MTA-like area separately.
- (2) Guam and Northern Mariana Islands are licensed as a single MTA-like area.
- (3) Puerto Rico and the U.S. Virgin Islands are ~~licensed~~ as a single MTA-like area.
- (4) American Samoa is licensed as a single MTA-like area.

* * * * *

MTA-based or MTA license. A license authorizing the right to use a specified block of SMR spectrum within one of the 51 Major Trading Areas.

* * * * *

2. Section 90.425 is amended by revising paragraph (e)(1) to read as follows:

* * * * *

(1) Station identification will not be required for 929-930 MHz nationwide paging licensees, MTA-based SMR licensees, and 900 MHz SMR Incumbent Wide Area License grantees. All other CMRS stations will be required to comply with the station identification requirements of paragraphs (a) through (d) of this section.

* * * * *

3. Subpart S is amended by adding a new heading following Section 90.659 to read as follows:

RULES GOVERNING THE LICENSING AND USE OF MTA-BASED SMR SYSTEMS IN THE 896-901/935-940 MHz BAND

4. A new Section 90.773 is added to Subpart S to read as follows:

§ 90.773 MTA-Based SMR Service Areas.

MTA licenses for SMR spectrum blocks in the 896-901/935-940 MHz band listed in Table 4B of Section 90.617(d) are available in 51 Major Trading Areas (MTAs) as defined in Section 90.7.

5. A new Section 90.775 is added to Subpart S to read as follows:

§ 90.775 MTA-Based SMR System Operations.

MTA-based licensees authorized in the 896-901/935-940 MHz band pursuant to Section 90.773 may construct and operate base stations using any frequency identified in their spectrum block anywhere within their authorized MTA, provided that:

(a) The MTA licensee observes the separation distances set forth in §90.621(b) with respect to the following, as applicable:

(1) all co-channel stations that were licensed or subject to pending license application prior to August 10, 1994; and,

(2) Incumbent Protected Areas.

(b) The MTA licensee complies with any rules and international agreements that restrict use of frequencies identified in its spectrum block, including the provisions of §90.619 relating to U.S./Canadian and U.S./Mexican border areas.

(c) The MTA licensee limits its field strength at any location on the border area of its MTA service area in accordance with §90.779.

6. A new Section 90.777 is added to Subpart S to read as follows:

§ 90.777 Construction Requirements.

(a) MTA licensees in the 896-901/935-940 MHz band must provide service (with a signal level sufficient to provide adequate service) to at least one-fourth of the population in their licensed service area within three years of being licensed and one-third of the population in their licensed service area within five years of being licensed. Coverage is based on ten-channel blocks, with coverage being calculated as the aggregate coverage of any one or more of the licensed ten channels. A licensee is required separately to meet the coverage requirements for each ten-channel block in which it is licensed in a given MTA.

(b) Licensees must file maps and other supporting documents showing compliance with the respective construction requirement, within the appropriate three- and five-year benchmarks of the date of their initial license. Population is defined as the 1990 population census. Licensees may elect to use the 2000 population census to determine the five-year construction requirement.

(c) Failure by any licensee to meet the requirements set forth in paragraphs (a) and (b) of this section will result in forfeiture of the license and the licensee will be ineligible to regain it.

7. A new Section 90.779 is added to Subpart S to read as follows:

§ 90.779 Field Strength Limits.

- (a) Except with respect to an MTA licensee's obligation to provide interference protection to incumbent operations in accordance with §90.775(a)(1) and (2), the predicted or measured field strength at any location on the border of the MTA service area shall not exceed 40 dBuV/m, unless the parties agree to a higher level.
- (b) In order to avoid interference at or near the MTA borders, MTA licensees are required to coordinate in good faith their frequency usage with co-channel adjacent MTA licensees and, if applicable, other affected parties. In the event that the adjacent co-channel licensees (and any other affected parties) cannot coordinate their operations, and the Commission receives a complaint of interference resulting from the failure to coordinate, the Commission will mediate, and, if necessary, may impose, a coordination plan.

8. Subpart S is amended by adding a new heading following Section 90.779 to read as follows:

RULES GOVERNING THE LICENSING AND USE OF INCUMBENT WIDE AREA SMR SYSTEMS IN THE 896-901/935-940 MHz BAND

9. A new Section 90.781 is added to Subpart S to read as follows:

§90.781 Incumbent Wide Area License.

A licensee of multiple contiguous base stations that were licensed or subject to pending application prior to August 10, 1994, in the same ten-channel block in the 896-901/935-940 MHz band may exchange its multiple site specific licenses with coverage in each MTA for a single license per MTA that gives it protection in the Incumbent Protected Area and that authorizes construction, modification, relocation and operation (in accordance with §90.783) of base stations in the Incumbent Operating Area associated with such multiple contiguous base stations. A single license may give protection and authorize operations in more than one Incumbent Protected Area and more than one Incumbent Operating Area, provided that all such areas are located within a single MTA. If, however, a given Incumbent Protected Area (or Incumbent Operating Area) of an incumbent licensee is located in more than one MTA, the incumbent licensee shall obtain a separate Incumbent Wide Area License for each MTA in which a portion of the Incumbent Protected Area (or Incumbent Operating Area) is located.

10. A new Section 90.783 is added to Subpart S to read as follows:

§90.783 Incumbent Wide Area SMR Operations.

(a) An incumbent SMR licensee operating a wide-area SMR system pursuant to a license granted under §90.781 may construct, modify, relocate and operate base stations using any frequency identified in its licensed ten-channel spectrum block(s) anywhere within its Incumbent Operating Area(s), provided that:

(1) A base station's 22 dBuV/m contour does not extend beyond the applicable Incumbent Operating Area.

(2) The incumbent licensee complies with any rules and international agreements that restrict use of frequencies identified in its spectrum block, including the provisions of § 90.619 relating to U.S./Canadian and U.S./Mexican border areas.

(b) The construction of new base stations, and/or the relocation or modification of existing base stations, within an Incumbent Operating Area shall not alter the contours of the Incumbent Protected Area or Incumbent Operating Area that are specified in an Incumbent Wide Area License.

(c) Notwithstanding paragraph (a)(1) of this section, an incumbent licensee and its adjacent MTA licensee can mutually agree on field strength limits other than those set forth in paragraph (a). Further, modifications that extend an incumbent's 22 dBuV/m contour beyond its Incumbent Operating Area are permissible so long as such expansion is *de minimis*, demonstrably unavoidable for technical reasons of sound engineering design, and coordinated in advance with the MTA licensee.

(d) An incumbent licensee may seek Commission authority to construct and operate individual base stations outside of its Incumbent Operating Area, but such sites may only operate on a secondary basis.

11. A new Section 90.785 is added to Subpart S to read as follows:

§90.785 Frequency Block Consolidation.

(a) Anytime prior to the date that the Commission releases the Public Notice(s) announcing the auction of MTA licenses in the 896-901/935-940 MHz band, an incumbent licensee may exchange its presently authorized ten-channel frequency block(s) for another ten-channel block, provided that its Incumbent Protected Area and Incumbent Operating Area do not change.

(b) Licensees in the 896-901/935-940 MHz band may exchange ten-channel frequency blocks following the auction of MTA licenses in the 896-901/935-940 MHz band, provided that all affected parties consent to any such exchange.

SAMPLE INCUMBENT WIDE AREA LICENSE AREA